

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:) Bankruptcy No. 04-32437
)
Jack L. and Carol A. Vande)
) Chapter 7 Case
Debtor(s).)

NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE

TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion on September 8, 2004, at 11:00 a.m., in Courtroom No. 228A, at the United States Courthouse, 316 North Robert Street, St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than September 2, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or August 27, 2004, seven days before the time set for the hearing (excluding Saturdays, Sundays, and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING. Local Bankruptcy Rule 9006-1.

Dated: _____

CLERK OF BANKRUPTCY COURT

By: _____
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:)	Bankruptcy No. 04-32437
)	
Jack L. and Carol A. Vande)	Chapter 7 Case
)	
Debtor(s).)	

NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. §707(b)

TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 11:00 a.m. on September 8, 2004, in Courtroom No. 228A, at the United States Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than September 2, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than August 27, 2004, which is seven business days before the time set for the hearing (excluding Saturdays, Sundays, and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding is a core proceeding. The petition commencing this Chapter 7 case was filed on April 22, 2004. The case is

now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtors, it appears that they have the ability to pay a substantial portion of their dischargeable debt without hardship.

7. The debtors list the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtors list two debts, secured by a truck and a mortgage.
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors list no claims.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors list fourteen claims totaling \$ 36,033.97.

8. The debts listed in the debtors' Schedule of Liabilities appear to be primarily consumer debt. *See* Debtor's Schedule F. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

9. On Schedule I, the debtors list monthly net income of \$4,222.90, based on gross monthly income of \$6,674.80 (including part-time income). The debtors have no dependents. According to the Statement of Financial Affairs, gross income in 2003 totaled \$82,181 or \$6,848.42 per month. In 2002, gross income totaled \$81,400 or \$6,783 per month. On June 30, 2004, the United States Trustee wrote for additional information. *See* Att. Ex. 1. The debtors responded on July 6, 2004 and July 9, 2004. Att. Exs. 2 and 3 (without attachments).

Based on the pay stub for the period ending June 12, 2004 (the 12th of 26 pay periods), Jack Vande, has averaged the following net pay in 2004^{1/}:

YTD Net Pay = \$ 23,970.57 divided by 12 = \$1,997.54 x 26 = \$ 51,936.24 divided by 12 = \$4,328.02 average net pay per month in 2004. Gross pay of \$32,514.62 averages to annual average pay of \$70,448.34. In 2003, his gross earnings were \$62,691.16 from two sources, but it appears that he did not hold his present job for the entire year last year.

Based on the pay stub for Carol Vande for the period ending June 13, 2004, her year-to-date net income totals \$7,250.06, which also appears to be the 12th of 26 pay periods. \$7,250.06 divided by 12 = \$604.17 x 26 = \$15,708.46 divided by 12 = \$1,309 average net pay per month. Ms. Vande's salary averages to annual gross income of \$ 18,258.48 per month. In 2003, her gross income was approximately \$7,632.95 from three different sources.

No pay information was provided for the part-time job listed on Schedule I, so the United States Trustee will disregard that amount for the purpose of this motion, but reserves the right to request the information later.

\$4,328.02 + \$1,309 = \$5,637.02 average net pay per month during 2004.

10. On Schedule J, the debtor lists monthly expenses of \$4,396.00. The debtors list a total of \$450.00 per month in back tax payments on two different lines. No tax debts are scheduled. The U.S. Trustee requested information regarding those tax debts, but did not receive specific information, other than the 2003 tax returns show that the debtors owed \$3,694 for federal income taxes and \$1,190 for state income taxes. The payments listed on Schedule J would pay off this debt in

^{1/} For both debtors, the pay stubs are not attached to prevent publication on the internet. Upon request, the United States Trustee will provide debtors' counsel with a copy of those records, in the event copies were not retained.

approximately 9 months. The debtors may be under withholding their taxes from pay stubs, so the United States Trustee will not make an adjustment to Schedule J at this time, but reserves the right to present a more detailed analysis later.

11. Average net monthly income of \$5,637.02 less monthly expenses of \$ 4,396.00 provides the debtors with monthly disposable income of \$1,241.02.

12. Monthly disposable income of \$1,241.02 is more than sufficient for the debtors to pay the unsecured creditors in full in a hypothetical thirty six month Chapter 13 plan. The debtors can pay the unsecured creditors in full in a hypothetical thirty-six month Chapter 13 plan with payments of \$ 1,000.94.

13. The debtors are currently employed, and there does not appear to be any likelihood that their employment will be terminated at any time in the future. Schedule I does not indicate that any changes in excess of 10% will occur in the next year.

14. The debtors have the ability to repay a substantial portion of their general unsecured debt and there appears to be no reason for their unwillingness to do so.

15. As an alternative to dismissal, the United States Trustee does not oppose voluntary conversion of this case to Chapter 13.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be dismissed.

Dated: August 5, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil

Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500



U. S. Department of Justice

Office of the United States Trustee

*Districts of Minnesota, North Dakota,
South Dakota and Iowa*

FILE COPY

U.S. Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, MN 55415

612 / 664-5500
FAX 612 / 664-5516

June 30, 2004

Christopher M. Kennedy
Kennedy & Kennedy
PO Box 3223
Mankato, MN 56002-3223

Re: *Jackie Laverne and Carol Ann Vande*, Bankr. No. 04-32437

Dear Mr. Kennedy:

As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. § 707(b). There is incomplete information in the above named case for our office to complete its investigation of this case. Please provide the following information on or before July 23, 2004:

1. Copies of last three most current pay stubs for both debtors.
2. Copies of the 2002 and 2003 state and federal tax returns, including attachments (W-2s).
3. Provide any documentation showing that any reduction for retirement is mandatory (if nothing is submitted, the United States Trustee shall assume that it is a voluntary contribution).
4. On Schedule J, the debtors list "past due taxes" payments of \$ 150.00 and "Internal Revenue Service/Minnesota Department of Revenue" payments totaling \$ 300.00. No tax debts are listed in the schedules. Please provide proof of these tax debts (including total amount due) and file amended schedules if necessary.

Please call if you have a question or concern about this letter.

Sincerely,

HABBO G. FOKKENA
UNITED STATES TRUSTEE

Sarah J. Wencil
Trial Attorney

cc: Jack and Carol Verde
Charles Ries, Chapter 7 Trustee

Att.Ex. 1

KENNEDY & KENNEDY
RECEIVED
ATTORNEYS AND COUNSELORS AT LAW
"Providing Solutions to Legal Problems Since 1973"

Michael H. Kennedy

2004 JUL -7 A 9:15

Christopher M. Kennedy

OFFICE OF THE
UNITED STATES TRUSTEE

July 6, 2004

Ms. Sarah J. Wencil
U.S. Department of Justice
Office of the United States Trustee
U.S. Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, MN 55415

Re: Jack L. and Carol A. Vande Bankruptcy No: 04-32437

Dear Ms. Wencil:

Enclosed you will find copies of the three most current pay stubs for both Jack and Carol Vande. They have also included a copy of their 2002 tax returns. My clients will be forwarding to my office their 2003 tax returns. Mr. Vande is requesting and will be providing the documentation regarding the reduction of the retirement as being mandatory. I assume that information will be available very shortly.

Mr. and Mrs. Vande anticipate they will be forwarding the remainder of the information to you in the next eight to ten days.

Sincerely,

KENNEDY & KENNEDY



Christopher M. Kennedy

CMK/lms
Enclosures

cc Jack and Carol Vande

KENNEDY & KENNEDY
ATTORNEYS AND COUNSELORS AT LAW
"Providing Solutions to Legal Problems Since 1973"

Michael H. Kennedy

2004 JUL 12 A 9:45 Christopher M. Kennedy

OFFICE OF THE
UNITED STATES TRUSTEE

July 9, 2004

Ms. Sarah J. Wencil
US Department of Justice
Office of the United States Trustee
US Courthouse, Suite 1015
300 South Fourth Street
Minneapolis MN 55415

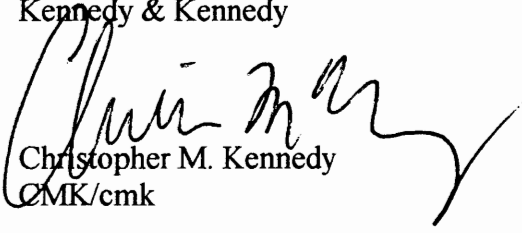
Re: Jack L. Vande and Carol A. Vande
Bankruptcy Number: 04-32437

Dear Ms. Wencil:

Enclosed you will find a copy of my client's 2003 Tax Returns along with attachments. We have also reviewed your third request, regarding the reduction for retirement, my clients have not scheduled any reduction from their wages for any retirement. Please advise if you need anything further.

Sincerely,

Kennedy & Kennedy


Christopher M. Kennedy
CMK/cmk

Cc: Jack and Carol Vande
1717 North 5th Street
St Peter MN 56082

VERIFICATION

I, Sarah J. Wencil, trial attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: August 5, 2004

Signed: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:) Bankruptcy No. 04-32437
)
Jack L. and Carol A. Vande) Chapter 7 Case
)
Debtor(s).)

MEMORANDUM OF LAW

The United States Trustee submits this memorandum in support of his motion to dismiss this case under 11 U.S.C. § 707(b). *See* Local Rule 9013-2(a).

Analysis

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make charitable contributions (that meet the definition of ‘charitable contribution’ under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4).

11 U.S.C. § 707(b) (1994) (as amended by Religious Liberty and Charitable Donation Protection Act of 1998). The United States Trustee bears the burden of showing substantial abuse. *In re Dubberke*, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

(1) The Debtor's Debts Are Primarily Consumer Debts.

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debts listed on Schedule F are primarily consumer debts. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

(2) The Granting of Relief under Chapter 7 Constitutes Substantial Abuse of Chapter Seven of the Bankruptcy Code.

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988);

United States Trustee v. Harris, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

While bad faith on the part of the debtor may constitute substantial abuse under Section 707(b), bad faith is not required to be shown to satisfy the "substantial abuse" standard when the debtor is otherwise able to repay his or her debts out of future income:

This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

Walton, 866 F.2d at 985 (quoting *In re Kelly*, 841 F.2d at 914-15); *Harris*, 960 F.2d at 76 (stating that "egregious behavior" by the debtor is not a necessary element for a Chapter 7 case to be dismissed under Section 707(b)). While the unique hardships and the good faith of the debtor are relevant factors, those factors are not as important as the ability of the debtor to fund a Chapter 13 plan. *Walton*, 866 F.2d at 983; *see also Harris*, 960 F.2d at 77 (rejecting the "totality of the circumstances" test espoused by the Fourth Circuit Court of Appeals in *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991), in favor of examining whether a debtor may fund a Chapter 13 plan out of future income).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not a relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13 petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with

future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In the District of Minnesota, there is no set percentage of repayment that must be met for substantial abuse to be present. The District Court of Minnesota opines that the determination of what is substantial should be made on a case-by-case basis:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See Walton; Fonder; see also In re Schmidt, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a de novo review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

Mathes v. Stuart (In re Mathes), Civil File No. 3-96-906, slip op. at 6-7 (D. Minn. July 2, 1997)

See also In re Shirley Wilkins, 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997) (Kishel, J.)

(holding that the ability to pay 28% in three years or 49% in five years of unsecured debts was a substantial abuse under § 707(b)).

In the present case, the debtors have the ability to pay all of the general unsecured creditors in a

hypothetical thirty six month Chapter 13 plan. The ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: August 5, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500

CERTIFICATE OF MAILING

In re:)	Chapter 7 Case
)	
Jack L. and Carol A. Vande)	Bankruptcy No. 04-32437
)	
Debtor(s).)	

The undersigned hereby certifies under penalty of perjury that she is an employee in the Office of the United States Trustee for the District of Minnesota, and is a person of such age and discretion as to be competent to serve papers and that on August 5, 2004, she served a copy of the attached: PROPOSED NOTICE OF HEARING, MOTION TO DISMISS UNDER 11 U.S.C. §707(b), MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND proposed ORDER by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

Addressee(s):

Jack and Carol Vande
1717 N. 5th St.
St. Peter, MN 56082

Christopher M. Kennedy
Kennedy & Dennedy
PO Box 3223
Mankato, MN 56002-3223

Charles Ries
PO Box 7
Mankato, MN 56002-0007


Nancy Poole

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:)	Bankruptcy No. 04-32437
)	
Jack L. and Carol A. Vande)	Chapter 7 Case
)	
Debtor(s).)	<u>ORDER</u>

At St. Paul, Minnesota, the _____ day of _____, 2004, the United States
Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) came before the Court for hearing.

Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of
the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

IT IS HEREBY ORDERED:

That the Chapter 7 bankruptcy case filed by the above-captioned debtor is dismissed pursuant
to 11 U.S.C. Section 707(b).

The Honorable Dennis D. O'Brien
United States Bankruptcy Judge